SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-381

MARSHALL WINOKUR and RAE WINOKUR, ABE BRODSKY and CELIA BRODSKY, and ETHELLE KATZ and BERTHA KATZ,

Petitioners,

VS.

BELL FEDERAL SAVINGS AND LOAN ASSOCIATION, HOME FEDERAL SAVINGS, and UPTOWN FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHICAGO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statute Involved	3
Statement of the Case	4
Reasons For Granting the Writ	7
I. THERE IS CONFLICT AMONG THE CIRCUITS THAT HAVE CONSIDERED THE QUESTION: THE SECOND, FIFTH AND NINTH CIRCUITS ACCEPT THE "DEATH KNELL" DOCTRINE WHILE THE THIRD AND SEVENTH CIRCUITS REJECT THAT DOCTRINE	7
A. Summary of the Collateral Order And Death Knell Doctrines	7
B. The Conflicting Decisions of the Circuits	10
(i) Second Circuit	11
(ii) Fifth Circuit	11
(iii) Ninth Circuit	12
(iv) Third Circuit	12
(v) Seventh Circuit	12
II. REJECTION OF THE COLLATERAL ORDER OR DEATH KNELL DOCTRINES SEVERELY HAMPERS ENFORCEMENT OF THE FEDERAL SECURITIES LAWS AND WILL HAVE WIDE PUBLIC IMPACT	13
CONCLUSION	17

Appendix

Opinion of the United States Court of Appeals for the Seventh Circuit A-1
Opinion of the United States District Court for the Northern District of Illinois A-3
Opinion of the United States Court of Appeals for the Seventh Circuit in King, et al. v. Kansas City Southern Industries, Inc., et al., ... A-11

AUTHORITIES CITED

Cases

Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972) 14
Berland v. Mack, 48 F.R.D. 121 (S.D.N.Y. 1969) 15
Brown Shoe Co., Inc. v. United States, 370 U.S. 294 (1962) 8
Caceres v. International Air Transport Association, 422 F.2d 141 (2nd Cir. 1970) 11
J. I. Case Co. v. Borak, 377 U.S. 426 (1964) 14
City of New York v. International Pipe & Ceramics Corporation, 410 F.2d 295 (2nd Cir. 1969) 11
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 6, 7, 8
Eisen v. Carlisle & Jacquelin,
370 F.2d 119 (2nd Cir. 1966) 6, 9, 11, 13, 15
391 F.2d 555 (2nd Cir. 1968) 15
..... F.2d ....., CCH Fed.Sec.L.Rep. ¶93,963 (2nd Cir. 1973) 11, 13
Escott v. Barchris Construction Corporation, 340 F.2d 731 (2nd Cir. 1965) 15
Falk v. Dempsey-Tegeler & Co., Inc., 472 F.2d 142 (9th Cir. 1972) 9, 12

Gillespie v. United States Steel Corp., 379 U.S. 148 (1964) 7, 8
Gosa v. Securities Investment Company, 449 F.2d 1330 (5th Cir. 1971) 11
Graci v. United States, 472 F.2d 124 (5th Cir. 1973) .. 9, 12
Green v. Wolf Corporation, 406 F.2d 291 (2nd Cir. 1968) 11
Hackett v. General Host Corp., 455 F.2d 618 (3rd Cir. 1972) 12, 13
Hawaii v. Standard Oil Co. of California, 405 U.S. 251 (1972) 15
Hohmann v. Packard Instrument Company, Inc., 399 F.2d 711 (7th Cir. 1968) 15
King v. Kansas City Southern Industries, Inc., ... F. 2d ....., No. 72-1734 (7th Cir. 1973) 6, 12
Korn v. Franchard Corp., 443 F.2d 1301 (2nd Cir. 1971) 11
LaMar v. H & B Novelty and Loan Company, 55 F.R.D. 22 (D. Ore. 1972) 16
Land v. Dollar, 330 U.S. 731 (1947) 8
Lerman v. Tenney, 459 F.2d 482 (2nd Cir. 1972) 11, 17
Local No. 438 Construction & General Laborers v. Curry, 371 U.S. 542 (1963) 8
Milberg v. Western Pacific Railway Co., 443 F.2d 1301 (2nd Cir. 1971) 11
Miller v. Mackey International, Inc., 452 F.2d 424 (5th Cir. 1971) 12
Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) 14
S.E.C. v. National Securities, Inc., 393 U.S. 453 (1969) 14
S.E.C. v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963) 14
Songy v. Costal Chemical Corporation, 469 F.2d 709 (5th Cir. 1972) 12

Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) 14
Surowitz v. Hilton Hotels Corp., 383 U.S. 363 (1966) .. 15
Tcherepnin v. Knight, 389 U.S. 332 (1967) 5
United States v. General Motors Corp., 323 U.S. 373 (1945) 8
Weeks v. Bareco Oil Co., 125 F.2d 84 (7th Cir. 1941) 15
Weight Watchers of Philadelphia, Inc., v. Weight Watchers International, Inc., 455 F.2d 770 (2nd Cir. 1972) 11
Weingartner v. Union Oil Co., 431 F.2d 26 (9th Cir. 1970) 12
Yaffe v. Powers, 454 F.2d 1362 (1st Cir. 1972) 12

Statutes and Rules

§10(b) Securities Exchange Act of 1934 (15 U.S.C. §78j (b)) 4
§27 Securities Exchange Act of 1934 (15 U.S.C. §78aa) 5
§1254(1) Judicial Code (28 U.S.C. §1254(1)) 2
§1291 Judicial Code (28 U.S.C. §1291) 3, 6, 7
§1292(b) Judicial Code (28 U.S.C. §1292(b)) 6
Rule 10(b)-5, Securities and Exchange Commission (17 C.F.R. §240.10b-5) 4
Rule 23, F.R.C.P. 5, 14, 15
Rule 54(b), F.R.C.P. 6

OTHER AUTHORITIES

9 Moore's Federal Practice 7, 8
Frankel, Amended Rule 23 From a Judge's Point of View, 32 Antitrust L.J. 295 (1966) 14
Hazard, The Effect of the Class Action Device Upon Substantive Law, 58 F.R.D. 307 (1973) 16
Note, The Impact of Class Actions on Rule 10(b)5, 38 U. Chi. L. Rev. 337 (1971) 16

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Marshall Winokur and Rae Winokur, Abe Brodsky and Celia Brodsky, and Ethelle Katz and Bertha Katz pray that a Writ of Certiorari issue to review an order of the United States Court of Appeals for the Seventh Circuit, entered on May 18, 1973, dismissing an appeal from an order of the United States District Court for the Northern District of Illinois denying plaintiff class action status to the above entitled cause.

OPINIONS BELOW.

The order of the United States Court of Appeals for the Seventh Circuit dated May 18, 1973 is unreported and appears at A. 1.

The United States District Court for the Northern District of Illinois rendered its opinion on October 17, 1972. This opinion is reported at 58 F.R.D. 178 (N.D. Ill. 1972) and appears at A. 3.

JURISDICTION.

The order of the Court of Appeals was entered May 18, 1973 and a timely petition for rehearing with suggestion for *en banc* rehearing was denied on June 12, 1973.

Certiorari jurisdiction is invoked pursuant to the provisions of 28 U.S.C. §1254(1).

QUESTIONS PRESENTED.

1. Whether an order denying plaintiff class status is appealable pursuant to 28 U.S.C. §1291 in a case in which the named plaintiffs' individual claims are so small that the absence of plaintiff class status makes further prosecution of the cause appear highly unlikely.

2. Whether the United States Courts of Appeal, in determining their jurisdiction over appeals from orders denying plaintiff class status, should recognize and apply the collateral order doctrine and the specialized application thereof relating to plaintiff class action status commonly referred to as the "death knell" doctrine.

STATUTE INVOLVED.

28 U.S.C. §1291 provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE.

In their complaint the plaintiffs alleged that the defendants (federally chartered Savings and Loan Associations) solicited funds by falsely advertising to the public that dividends equivalent to daily compound interest would be paid on deposits. Plaintiffs claimed that the advertising was false since the defendants actually calculated "interest" in such a manner that earnings were forfeited on withdrawals of money prior to the end of any calendar quarter. Plaintiffs further alleged that the advertising was false because the defendants omitted to state that deposits made after the 10th day of any month did not earn any dividends until the first day of the following month (although they widely advertised that deposits made by the 10th earned from the first of the month). In essence, defendants solicited deposits by claiming to pay daily compound interest and did not do so.

Plaintiffs alleged that the foregoing omissions are material to rational investment decision and, since savings accounts are securities, defendants had violated §10(b) of the Securities Exchange Act of 1934 and Rule 10(b)-5*

* Rule 10(b)-5, 17 C.F.R. §240.10b-5, reads as follows:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security."

promulgated by the Securities and Exchange Commission. See *Tcherepnin* v. *Knight*, 389 U.S. 332 (1967). Jurisdiction was based upon §27 of that Act and is not dependent upon the amount in controversy.

The individual monetary claims of plaintiffs do not exceed $12. This amount represents the "interest" lost from the plaintiffs' savings accounts on withdrawals made prior to the end of a calendar quarter and "interest" not paid on monies deposited in the 18 to 21 day period after the 10th of the month. The minuscule amount of individually claimed damages was reported to the lower court and was discernible from the passbooks and other papers filed in the district court.

On October 17, 1972 the district court entered an order denying plaintiff class status to the cause. The lower court stated that whether each class member had read the defendants' advertisements and been misled thereby, and whether each class member had learned of the interest actually payable, were individual questions which were essential to determine the materiality of the misrepresentations. The lower court concluded ". . . whether or not there has been a material misrepresentation is not a question common to the class but rather is a question to be answered by each individual member of the class." A. 5. Thus, the lower court reasoned, the commonness required by class action Rule 23(a)(2), F.R.C.P., was absent. The district court disclaimed any need to decide the extensively briefed question as to whether reliance was a necessary element of a Rule 10(b)5 claim (A. 6). Instead, the court posited a new concept—"individual materiality."

Thereafter, after plaintiffs' motion for a 28 U.S.C. §1292(b) interlocutory certification and for a finding pursuant to Rule 54(b), F.R.C.P., regarding the denial of plaintiff class status, was denied by the district court, a notice of appeal to the Seventh Circuit was filed on November 13, 1972.

After plaintiffs' Opening Brief in the Court of Appeals had been filed, defendants moved to dismiss the appeal for lack of jurisdiction upon the ground that the order denying plaintiff class status was not a final order under 28 U.S.C. §1291. Plaintiffs responded that such an order was a final order for purposes of §1291 under the "collateral order" and "death knell" doctrines of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and *Eisen* v. *Carlisle & Jacquelin*, 370 F.2d 119 (2nd Cir. 1966), respectively. On May 18, 1973, in an order applicable to three separate appeals, the Seventh Circuit dismissed plaintiffs' appeal (A. 1).* By virtue of the May 18th order in the case at bar and the *per curiam* opinion in the *King* case (A. 11), the Seventh Circuit has wholly rejected the appealability pursuant to 28 U.S.C. §1291 of any district court order denying class status.

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* Since pursuant to Rule 29, Rules of the United States Court of Appeals for the Seventh Circuit, this order was not to be cited in the Circuit as precedent, on June 12, 1973, a *per curiam* opinion using substantially the same language as the May 18 order was issued in another class action appeal, *King* v. *Kansas City Southern Industries, Inc.*, No. 72-1734. (A. 11.)

REASONS FOR GRANTING THE WRIT.

I.

THERE IS CONFLICT AMONG THE CIRCUITS THAT HAVE CONSIDERED THE QUESTION: THE SECOND, FIFTH AND NINTH CIRCUITS ACCEPT THE "DEATH KNELL" DOCTRINE WHILE THE THIRD AND SEVENTH CIRCUITS REJECT THAT DOCTRINE.

Five circuits have now considered the question and sharp conflict has developed. Three circuits accept appeals from "final" orders denying plaintiff class status if it appears unlikely that the suit would be prosecuted as an individual action, and two circuits reject all such appeals and the "death knell" doctrine upon which such appeals are grounded. A discussion of the appealability doctrines involved and a listing of the cases follows.

A. Summary Of The Collateral Order And Death Knell Doctrines.

Section 1291 of 28 U.S.C. contemplates appeal to the Courts of Appeal only from "final decisions." The purpose of thus limiting appeals is to preclude piecemeal appeals, prevent harrassment of litigants and conserve judicial effort. See 9 Moore's Federal Practice, ¶110.07. Nevertheless, this Court has repeatedly held that §1291 is to be given a "practical rather than a technical construction" (*Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)), and that the danger of denying justice must be balanced against the inconvenience and costs of piece-meal review. (*Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152-3 (1964)). "The Court has adopt-

ed essentially practical tests for identifying those judgments which are, and those which are not, to be considered 'final'. . . . A pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action': the touchstones of federal procedure." *Brown Shoe Co., Inc.* v. *United States,* 370 U.S. 294, 306 (1962). Accordingly, this Court has not hesitated to review trial court rulings in cases not yet finally tried where those rulings were "fundamental to the further conduct of the case." *United States* v. *General Motors Corp.,* 323 U.S. 373, 377 (1945); *Gillespie* v. *United States Steel Corp.,* 379 U.S. 148, 153 (1964); *Land* v. *Dollar,* 330 U.S. 731, 734 (1947).

The case of *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949), as developed in subsequent opinions such as *Gillespie, supra,* and *Local No. 438 Construction & General Laborers* v. *Curry,* 371 U.S. 542, 548-50 (1963), establishes the appealability of orders which "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." This has come to be denominated the "collateral order" doctrine. See 9 Moore's Federal Practice, ¶110.12 at p. 150. It is, of course, the practical effect and not the surface appearance of the particular order from which the appeal is taken that is the determining factor and the order appealed from need be neither the final, i.e. last, order in the case nor a "final" decision in a technical sense. *Gillespie* v. *United States Steel Corp.,* 379 U.S. 148, 153 (1964).

As applied to plaintiff class action determinations, there evolved the so-called "death knell" refinement of the "collateral order" doctrine. *Graci* v. *United States,* 472 F.2d 124, 126 (5th Cir. 1973). The "death knell" doctrine was first enunciated by the Second Circuit in *Eisen* v. *Carlisle & Jacquelin,* 370 F.2d 119 (2nd Cir. 1966), as a logical application of the collateral order doctrine. The death knell doctrine was simply stated in *Eisen,* at p. 121, as follows:

> "Dismissal of the class action in the present case, however, will irreparably harm Eisen and all others similarly situated, for, as we have already noted, it will for all practical purposes terminate the litigation. *Where the effect of a district court's order, if not reviewed, is the death knell of the action, review should be allowed.*" (Emphasis supplied.)

In reaching its conclusion, the court observed at p. 120:

> "The alternatives are to appeal now or to end the lawsuit for all practical purposes. Judge Tyler's order 'if unreviewed, will put an end to the action'. . . . We can safely assume that no lawyer of competence is going to recover $70 for Mr. Eisen. . . . If the appeal is dismissed, not only will Eisen's claims never be adjudicated, but no appellate court will be given the chance to decide if this class action was proper under the newly amended Rule 23."

In other words, if the denial of plaintiff class status will result in the practical termination of the lawsuit because the individual claim asserted is of such small monetary significance, then appeal from such an order will lie. As explained in footnote 3 in *Falk* v. *Dempsey-Tegeler & Co., Inc.,* 472 F.2d 142, 143 (9th Cir. 1972):

"Where an order of a District Court denying class action treatment would terminate the individual claim of the plaintiff, and in effect sound the 'death knell' for his action, the decisions of the Second Circuit permit review. *Green* v. *Wolf Corporation*, 406 F.2d 291 (2nd Cir. 1968); *Eisen* v. *Carlisle & Jacquelin*, 370 F.2d 119 (2nd Cir. 1966). Where, by reason of the dollar amount at stake or otherwise, plaintiff's claim retains its vitality despite the denial of class action status, the order is not subject to review under 28 U.S.C. §1291 (1970); *Caceres* v. *International Air Transport Association*, 422 F.2d 141 (2nd Cir. 1970); *City of New York* v. *International Pipe & Ceramics Corporation*, 410 F.2d 295 (2nd Cir. 1969)."

B. The Conflicting Decisions Of The Circuits.

If the "death knell" doctrine is embraced, then the Court of Appeals will determine the appealability of an order denying class status to the plaintiff by weighing the likelihood of effective prosecution of the individual claims asserted by the named class representatives, i.e., does the named individual plaintiff have enough at stake so that it is reasonable to expect him to proceed with the rigors of the trial on the merits, and to do so in an effective manner.

There follows an enumeration of the reported decisions in which the death knell doctrine has been approved and applied by various courts. In many of these cases the reviewing court by application of the death knell doctrine found that the amount at stake for the named plaintiffs was large enough so as to make it appear probable that the case would be competently tried even though class action status were denied. There is little doubt that had only $12 been involved, these courts would

have allowed the appeal and decided the propriety of the class order, as becomes apparent from the information as to the size of the individual claim noted after the citation.

(i) Second Circuit:

Eisen v. *Carlisle & Jacquelin*, 370 F.2d 119 (1966), *cert. den.*, 386 U.S. 1035 (1967) ($70)* (appeal allowed)

Green v. *Wolf Corp.*, 406 F.2d 291, 295 (1968) (less than $1,000) (appeal allowed)

City of New York v. *International Pipe & Ceramics Corp.*, 410 F.2d 295, 298-9 (1969)

Caceres v. *International Air Transport Association*, 422 F.2d 141 (1970) (approximately $150,000 on average)

Milberg v. *Western Pacific Railway Co.*, 443 F. 2d 1301 (1971) ($8,500)

Korn v. *Franchard Corp.*, 443 F.2d 1301, 1304-06 (1971) ($386) (appeal allowed)

Weight Watchers of Philadelphia, Inc. v. *Weight Watchers International, Inc.*, 455 F.2d 770, 772-3 (1972) (approximately $150,000 on average)

Lerman v. *Tenney*, 459 F.2d 482 (1972) (appeal allowed)

Eisen v. *Carlisle & Jacquelin*, ... F.2d ....., CCH Fed. Sec. L. Rep. ¶93,963 (May 1, 1973), rehearing den. ¶93,999 ($70)

(ii) Fifth Circuit:

Gosa v. *Securities Investment Company*, 449 F. 2d 1330 (1971) ($3,322)

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* The amount involved in the plaintiff's individual claim, if discernible from the opinion or if known to counsel, is noted following the citation.

Miller v. *Mackey International, Inc.*, 452 F.2d 424, 427, fn. 3 (1971) (appeal allowed)
Songy v. *Costal Chemical Corporation*, 469 F.2d 709 (1972)
Graci v. *United States*, 472 F.2d 124, 126 (1973) ($78,700)

(iii) Ninth Circuit:
Weingartner v. *Union Oil Co.*, 431 F.2d 26 (1970) ($23,580 average in Count I; $34,800 average in Count II)
Falk v. *Dempsey-Tegeler & Co., Inc.*, 472 F.2d 142, 143 (1972) ($14,125)

See also *Yaffe* v. *Powers*, 454 F.2d 1362 (1st Cir. 1972), in which appeal of an order denying plaintiff class status was permitted under 28 U.S.C. §1292(a)(i) as a denial of a motion seeking injunctive relief.

As to circuits which reject the "death knell" doctrine, or deny appealability of class action orders under the collateral order doctrine, see:

(iv) Third Circuit:
Hackett v. *General Host Corp.*, 455 F.2d 618 (1972), *cert. den.*, 407 U.S. 925 (1972) ($6)

(v) Seventh Circuit:
King v. *Kansas City Southern Industries, Inc.*, No. 72-1734 (June 12, 1973) (A. 7.) ($60)
Winokur, et al. v. *Bell Federal Savings & Loan Association, et al.* (May 18, 1973) (A. 1.) ($12)

It is worth noting that the *Hackett* decision, which the Seventh Circuit chose to follow here, was decided by a divided court, over a perceptive and eloquent dissent by

Justice Rosenn. Furthermore, the result reached by the majority in *Hackett* was strongly influenced by the fact that the statute under which the action was brought, unlike the statute in *Eisen* or in this case, expressly authorized the award of attorneys fees to a successful plaintiff.* The presence of this factor may well have played a role in this Court's denial of certiorari in *Hackett,* for it served to blur the conflict with *Eisen.* Also, the Third Circuit appears to have been swayed by the enormity of the size of the class. Finally, a careful reading of the majority opinion in *Hackett* makes it plain that the Court was also influenced by its belief that the Second Circuit had substantially retreated from its original position in *Eisen.* (See 455 F. 2d, at pp. 621-22). That belief, however, was not correct. In a subsequent opinion in the *Eisen* litigation, (..... F.2d .....; CCH Fed. Sec. L. Rep. ¶93,963, *rehearing den.,* ¶93,999 (2nd Cir. 1973), the Second Circuit went considerably out of its way to reaffirm its whole hearted adherence to the "death knell" doctrine.

II.

REJECTION OF THE COLLATERAL ORDER OR DEATH KNELL DOCTRINES SEVERELY HAMPERS ENFORCEMENT OF THE FEDERAL SECURITIES LAWS AND WILL HAVE WIDE PUBLIC IMPACT.

To a significant degree, enforcement of the Federal securities laws, especially in the antifraud and proxy vio-

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* Unlike other statutes (e.g., the Securities Act of 1933 and the Clayton Act and other sections of the Securities Exchange Act of 1934, e.g., §§ 9 and 18), §10(b), the substantive basis for the case at bar, does not provide for imposition of attorneys' fees against defendants if plaintiffs are successful.

lation areas, is in the hands of "private attorneys general" in quest of "corporate therapeutics." This Court appears consistently to have favored the right of securities holders to enforce the private rights of action granted by or implied from the Securities Exchange Act of 1934 as a means to enforce compliance with that statute. *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970); and *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128 (1972). See also *S.E.C.* v. *National Securities, Inc.*, 393 U.S. 453 (1969) and *S.E.C.* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963).

Such expressions of a right certainly imply that effective remedies to correct the alleged wrongs exist. See *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970); and *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969).

In many securities cases which involve publicly held securities the amount of individual damage is small and becomes significant in an economic sense only in the aggregate. In such cases there comes into play the class action provisions of Rule 23, F.R.C.P. As explained by the reporter for the Advisory Committee that drafted new Rule 23, F.R.C.P., Professor Benjamin Kaplan, the "historic mission" of the class action is "taking care of the small guy." Quoted in Frankel, Amended Rule 23 From a Judge's Point of View, 32 Antitrust L. J. 295, 299 (1966). This statement confirms that the underlying purpose of new Rule 23 is to serve as a vehicle for redressing wrongs of small claimants—wrongs which in the absence of the class action device would go unremedied.

Escott v. *Barchris Construction Corporation,* 340 F.2d 731, 733 (2nd Cir. 1965), *cert. den.* 382 U.S. 816 (1965). Rare indeed would be the claimant who, but for the class device, would prosecute a suit for $10, $20 or $30 of lost dividends. Few lawyers would undertake such a case. It is only by the aggregation of many small claims that the wrong can be vindicated. See also *Eisen* v. *Carlisle & Jacquelin,* 391 F.2d 555, 560 (2nd Cir. 1968); *Hohmann* v. *Packard Instrument Company, Inc.,* 399 F.2d 711 (7th Cir. 1968); *Weeks* v. *Bareco Oil Co.,* 125 F.2d 84 (7th Cir. 1941), and the authorities collected in *Berland* v. *Mack,* 48 F.R.D. 121 (S.D.N.Y. 1969).

This Court continues to recognize that the class action device permits citizens "to combine their limited resources to achieve a more powerful litigation posture." *Hawaii* v. *Standard Oil Co. of California,* 405 U.S. 251, 92 S. Ct. 885, 893, 895 n. 4 (1972). See also *Surowitz* v. *Hilton Hotels Corp.,* 383 U.S. 363 (1966), in which at p. 373 the Court, in a derivative suit, observed that old Rule 23(b), F.R.C.P. was to be read "to further, not defeat the ends of justice" and to assist in the protection of small investors.

It cannot reasonably be assumed that this $12 case will be prosecuted by any lawyer "worth his salt." Denial of appealability of the lower court's order effectively destroys the substantive claim. See *Eisen,* at p. 9, *supra.* This is so since even if the plaintiff should elect to try a $12 case, it simply cannot be prepared with the same resources that a $1,000,000 case warrants, and the likelihood of loss on the merits is extremely high. Irrespective of how the Court of Appeals views the class action issue in an appeal taken *after* trial, the merit deter-

mination by the lower court will probably not be reversed.

It is important, of course, that these claims be enforced so that the securities laws do not become empty legislative gestures. As stated by Circuit Judge Alfred Goodwin in *LaMar* v. *H & B Novelty and Loan Company*, 55 F.R.D. 22, 24 (D. Ore. 1972):

> "One important function of the class action is to afford meaningful rights to persons who may be ignorant of such rights . . . or to those whose individual claims are to small to support custom-tailored litigation. . . . If the Rule is to be effective, the courts should not restrict class membership by narrow and grudging rules. Unduly restrictive limitations upon the class may have the effect of denying legal remedies to the ignorant and the poor while creating windfall immunities for law violators." (references omitted)

Thus, it is only the aggregation of many small claims which permits redress. Without such combining of forces the prosecution of the alleged wrongdoers is crippled. The interdependence of the class device and Rule 10-(b)5 actions is especially strong, and the diminution of one necessarily diminishes the use of the other. See, The Impact of Class Actions on Rule 10(b)5, 38 U. Chi. L. Rev. 337 (1971); Hazard, The Effect of the Class Action Device Upon Substantive Law, 58 F.R.D. 307 (1973).

CONCLUSION.

The Courts of Appeal await guidance on this subject and "hope that this issue will be settled by the highest authority." *Lerman* v. *Tenney*, 459 F.2d 482 (2nd Cir. 1972). This Court should issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review its order dated May 18, 1973.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

May 18, 1973.

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

EDWARD Q. LUPIA, Etc.,
Plaintiff(s)-Appellant,
No. 73-1026 vs.
STELLA D'ORO BISCUIT CO., INC.,
Defendant-Appellee.

FRANK A. GARZA, Etc.,
Plaintiff-Appellant,
No. 73-1012 vs.
CHICAGO HEALTH CLUBS, INC., et al.,
Defendant-Appellees.

MARSHALL WINOKUR, et al.,
Plaintiffs-Appellants,
No. 72-2029 vs.
BELL SAVINGS & LOAN ASSOCIATION, et al.,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 72 C 738
Philip W. Tone,
Judge
No. 71 C 643
Richard W. McLaren
Judge
No. 70 C 1177
William J. Bauer,
Judge

ORDER

These three cases involve the much disputed question whether the dismissal of a class action portion of a complaint is appealable. In *Thill Securities Corp.* v. *New*

York Stock Exchange, 469 F.2d 14, 17 (7th Cir. 1972), we held that the denial of a motion to strike a class action was not an appealable order under 28 U.S.C. § 1291. We now hold that the present orders are not appealable, necessitating the dismissal of the three appeals for lack of jurisdiction.

In so holding, we follow *Hackett* v. *General Host Corp.,* 455 F.2d 618 (3d Cir. 1972), certiorari denied, 407 U.S. 925; *Gerstle* v. *Continental Airlines, Inc.,* 466 F.2d 1374 (10th Cir. 1972); and our analogous prior decision in *Jumps* v. *Leverone,* 150 F.2d 876 (7th Cir. 1945). If the interlocutory appeals route of 28 U.S.C. § 1292(b) had been successfully followed, review would be available. 9 Moore's Federal Practice ¶ 110.13[9] p. 184 (2d ed. 1972).

Appeals dismissed.

MEMORANDUM OPINION AND ORDER

Bauer, District Judge.

This cause comes on defendants' motion pursuant to Rule 23(c) of the Federal Rules of Civil Procedure for an order denying the right to maintain this cause as a class action as to plaintiffs. This Court previously ruled on March 27, 1972 that a class action as to the defendants could not be maintained in this suit.

The named plaintiffs Marshall and Rae Winokur are holders of a savings account issued by defendant Bell Federal Savings and Loan Association (hereinafter referred to as "Bell"); Abe and Celia Brodsky, at all times relevant to this suit, were holders of a savings account issued by defendant Home Federal Savings (hereinafter referred to as "Home"); and plaintiffs Ethelle and Bertha Katz, at all times relevant to this suit, were holders of a savings account issued by Uptown Federal Sav ings and Loan Association of Chicago (hereinafter referred to as "Uptown"). Bell, Home and Uptown, all federally chartered savings and loan associations, are authorized by statute[1] to raise capital by the sale of savings accounts to the public.

The complaint alleges that plaintiffs are purchasers and/or sellers of securities and that the defendants have made and are continuing to make misstatements and omissions of material fact in connection with such purchases and sales in violation of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, and Rule 10(b)(5) of the Rules of the Securities and Exchange Commission,

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[1] 12 U.S.C. § 1464.

17 C.F.R. § 240.10b-5. More specifically, plaintiffs allege the following misleading statements:

1. "The defendants falsely advertise that the dividends paid by them are the equivalent of interest compounded daily. . . ." [This is alleged to be a misstatement because if a depositor withdraws prior to the last day in any calendar quarter, he is paid no dividends at all on the withdrawn funds for that quarter.]

2. "The defendants omit to state that no dividend at all is paid for the balance of a calendar month in which a deposit is made subsequent to the 10th day of that month." [This is alleged to be misleading because defendants advertise that "all savings in by the 10th earn from the 1st" and omit to mention that deposits made after the 10th of the month do not earn interest until the first of the following month.]

Jurisdiction is alleged under 15 U.S.C. § 78aa. At this time, the Court need not consider the propriety of jurisdiction under this section.

Plaintiffs seek to bring this suit as a class action under Rule 23 on behalf of all persons who have withdrawn or deposited money in Bell, Home, and Uptown and who have thereby suffered loss in that they "(i) withdrew funds prior to the end of a calendar quarter and did not receive dividends equivalent to interest compounded daily, or (ii) deposited funds after the 10th day and prior to the end of the month and received no dividends at all for this period."

Plaintiffs contend that they meet the requirements of Rule 23, directing the main thrust of their arguments to the propositions that: (1) they are representative of the plaintiff class they seek to represent; (2) there are questions of law and fact common to the class and that these questions "predominate over questions affecting only individual members"; and (3) such a class action is manageable because where a Rule 10(b)(5) violation is alleged reliance by each member of the class on the misrepresentation need not be shown, but rather merely the materiality of the misrepresentation must be shown.

Defendants contend that the requirements of Rule 23 have not been satisfied because, *inter alia*, the individual plaintiffs are not representative of the class on whose behalf they are suing. Defendants further contend that numerous individual questions are raised by this action, that consequently common issues do not predominate, and that the class action would be an unmanageable rather than a superior means of adjudicating this controversy. Defendants also take the position that an individual does not have a claim for a misleading statement under Rule 10(b)(5) unless the individual relied on the statement to his detriment.

The arguments presented by the plaintiffs are unpersuasive; thus, this Court finds that the requirements for a Rule 23 class action have not been satisfied.

REQUIREMENTS FOR THE MAINTENANCE OF A CLASS ACTION

In order for a class action to be the proper mechanism for adjudicating a controversy, the following requirements for Rule 23(a) must all be satisfied:

1. the class must be so numerous that joinder of all members would be impracticable;
2. there must be questions of law or fact common to the class;
3. the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
4. the representative parties must fairly and adequately protect the interests of the class.

In addition, one of the provisions of Rule 23(b) must also be satisfied. This Court is of the opinion that the purported class of plaintiffs does not meet at least two of the four prerequisites of Rule 23(a).

THE CLAIMS OF THE REPRESENTATIVE PARTIES ARE NOT TYPICAL OF THE CLAIMS OF THE CLASS

In *Jacobs* v. *Paul Hardeman, Inc.*, 42 F.R.D. 595 (S.D. N.Y.1967), plaintiffs sought on behalf of a class of "all present and former debenture holders similarly situated" the rescission of individual purchases of debentures and damages for alleged misrepresentations in and omissions of material facts from a registration statement and prospectus. The court dismissed the class action aspect of the complaint on grounds that:

> ". . . while there are probably some questions of law and fact common to some of the purchase transactions, this . . . is certainly not true as to all." 42 F.R.D. at 598.

The court held that the requirements of 23(a)(3) and (4) had not been complied with because the named plain-

tiffs had purchased stock from underwriters on the basis of a prospectus and registration statement while other members of the class had later purchased in the open market after various information about the company's financial reverses had been publicized. The court in dismissing the class action concluded that the claims of the named plaintiffs would not be typical of those of the later purchasers, that their factual and legal positions were significantly different, and thus that the later purchasers would not be fairly and adequately represented.

It is the opinion of this Court that the questions of fact subject to determination in this cause will be almost as numerous as the members of the plaintiffs' class and that there are potentially as many classes as depositors. This situation is caused by the fact that different representations have been made to every member of the class. Where there is an attempt to bring a class action based on an alleged 10(b)(5) violation, there must be a material misrepresentation which is common to the class. *Jacobs* v. *Paul Hardeman, supra.* It is clear from the pleadings that each individual defendant utilized a different advertisement which would be relevant only to claims made by its own customers. Thus, contrary to the contentions of the plaintiff, there are at least three major groupings within the class to whom varied representations have been made. Further, it is also clear from the pleadings that many, if not most, customers of these savings and loan associations open their accounts in person at the office of the association and are fully advised at that time of the various types of accounts offered, as well as the rules, regulations and terms pertaining to each type of account—including the

rate and basis of computing interest. Many other individual depositors received the same information by phone or letter. Additionally, the passbook or certificate given to the depositor generally contains this information. Thus, information that was not contained in the plaintiffs' advertisements was in fact available and known to many depositors before funds were committed.[2] In each of these situations, there were different representations made by different individuals which would affect the materiality of the "misrepresentations".

It is the opinion of this Court that there are factual questions essential to the claim of each member of the class (as defined by plaintiff) which cannot be answered within the framework of a class action. This Court further believes that it would be impossible without a hearing on the claim of each individual member of the class to determine which depositors of defendant savings and loan associations are in fact members of the class. It would be necessary to determine (1) what type of account

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[2] The Court in *Kohler* v. *Kohler Co.*, 319 F.2d 634 (7th Cir. 1963) ruled that defendants are obliged to disclose to plaintiffs only those material facts which are reasonably believed to be unknown to the plaintiff. In *City National Bank of Fort Smith, Arkansas* v. *Vanderboom*, 422 F.2d 221, 231 (8th Cir. 1970) the Court noted that the Seventh Circuit had held in *Kohler* that:

> ". . . the failure of [defendant] to disclose material facts to the plaintiff will not lead to liability under 10b-5 where the plaintiff himself has the ability and opportunity to discover those facts easily."

Recent cases similar to the one at Bar have held that defendants are not required to say that which has been publicly proclaimed in several different ways on several different occasions. *Johnson* v. *Wiggs*, 443 F.2d 803 (5th Cir. 1971); *Mitchell* v. *Texas Gulf Sulphur Co.*, 446 F.2d 90 (10th Cir. 1971), cert. denied, 404 U.S. 1004, 92 S.Ct. 564, 30 L.Ed.2d 558 (1971); *Hafner* v. *Forest Laboratories, Inc.*, 345 F.2d 167 (2d Cir. 1965); *Phillips* v. *Reynolds and Co.*, 294 F.Supp. 1249 (E.D.Pa.1969).

an individual had and whether it was subject to the claims raised by plaintiffs; (2) whether each alleged member of the class had, in fact, read the advertisements complained of and had been misled by any of the alleged misrepresentations contained therein; and (3) whether representations of the interest policy had been made to him orally or whether he had read a statement of the interest policy contained in his passbook or in the association's charter which would counter the advertisements complained of. Answers to all of the above questions are essential to determine whether there have been "material misrepresentations".

Because of the above factors, the question of whether or not there has been a material misrepresentation is not a question common to the class but rather is a question to be answered by each individual member of the class. Thus, as in the *Jacobs* case, the claims of the named plaintiffs are not typical of those of all depositors in Bell, Home or Uptown who are alleged to be members of the class, since individual factual situations of each class member may vary significantly. In addition to the variance of claims as between named and unnamed plaintiffs, already two of the six named plaintiffs have presented a claim which is not typical of the original claim presented on behalf of the class.[3]

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[3] The discovery process elicited the fact that neither Abe nor Celia Brodsky had made any deposits after the 10th of the month. Further, despite advertisements which were allegedly misleading, both Abe and Celia admitted during a deposition that they knew the interest policy of Home Federal Savings and had never relied on the allegedly misleading advertisement. The Brodskys, *qua* named plaintiffs, seek to represent all persons misled by the Home advertisement. However, the facts as disclosed by depositions reveal that the Brodskys themselves are not members of

The Advisory Committee Notes to Rule 23 state:

> ". . . [On] the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed."

In line with this position, courts have denied class actions in suits involving 10(b)(5) violations because of varying misrepresentations and the consequent absence of significant questions of fact common to all members of the putative class.[4]

It is this Court's opinion that the plaintiffs cannot maintain a class action because they have not met the requirements of Rule 23(a). Thus, this Court need not decide whether the plaintiffs in their quest for a class action have met the requirements of Rule 23(b) or whether reliance is still an essential element of 10(b)(5) action.

Accordingly, it is hereby ordered that defendants' motion to disallow the maintenance of the instant action as a class action is granted.

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the class which they seek to represent. These facts indicate not only that the Brodskys may encounter difficulty in successfully bringing this claim but also that the claims of individual named plaintiffs are not typical even among themselves.

[4] *Morris* v. *Burchard*, 5 F.R.D. 530 (S.D. N.Y. 1971); *Moscarelli* v. *Stamm*, 288 F.Supp. 453 (E.D.N.Y.1968)

In The

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

SEPTEMBER TERM, 1972 — APRIL SESSION, 1973

No. 72-1734

JORDAN JAY KING, et al.,
Plaintiffs-Appellants,

v.

KANSAS CITY SOUTHERN INDUSTRIES, INC., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 71 C 2141
Hubert L. Will, Judge.

ARGUED JUNE 12, 1973 — DECIDED JUNE 12, 1973

Before PELL and STEVENS, *Circuit Judges,* and ESCHBACH, *District Judge.**

PER CURIAM. This is an appeal by a group of plaintiffs in only one of six consolidated cases pending in the district court. In the instant case, the district court on June 22, 1972, entered its order denying plaintiffs' motion to have this action designated as a class action. Plaintiffs filed their notice of appeal to this court from that order and concede that they base their right of appeal, if any, on 28 U.S.C. §1291.

* Honorable Jesse E. Eschbach is sitting by designation from the United States District Court for the Northern District of Indiana.

Defendant-appellee Kansas City Southern Industries, Inc., has filed its motion to dimiss the appeal for the reason that the order below was an interlocutory order not appealable under 28 U.S.C. §1291. We agree.

The question before the court on the motion to dismiss involves a much disputed question as to whether the dismissal of a class action portion of a complaint is appealable. In *Thill Securities Corp.* v. *New York Stock Exchange,* 469 F.2d 14, 17 (7th Cir. 1972), this court held that the denial of a motion to strike a class action was not an appealable order under 28 U.S.C. §1291. We now hold that the present order is not appealable under §1291, necessitating the dismissal of the appeal for lack of jurisdiction.

In so holding, we follow *Hackett* v. *General Host Corp.,* 455 F.2d 618 (3d Cir. 1972), *cert. denied,* 407 U.S. 925; *Gerstle* v. *Continental Airlines, Inc.,* 466 F.2d 1374 (10th Cir. 1972); and our analogous prior decision in *Jumps* v. *Leverone,* 150 F.2d 876 (7th Cir. 1945). We decline to adopt and accordingly reject the so-called "death knell" theory originally enunciated in *Eisen* v. *Carlisle & Jacquelin,* 370 F.2d 119 (2d Cir. 1966), *cert. denied,* 386 U.S. 1035 (1967). Likewise we do not find the "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949), applicable to the type of order here involved.

On June 11, 1973, the plaintiffs below purported to secure an order from the district court amending, on a nunc pro tunc basis, the order of June 22, 1972, which amended order would have permitted, pursuant to 28 U.S.C. §1292(b), an appeal on the class action status

as involving a controlling question of law as to which there is a substantial ground for difference of opinion. Our present disposition does not reach the issues raised by that action and we express no opinion as to whether the power existed in the district court to amend its previous order on a nunc pro tunc basis while an appeal was pending in this court, nor do we express an opinion as to whether this court in its discretion should permit an appeal to be taken from such order in the event it was properly entered below.

APPEAL DISMISSED.